Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Geographic Partitioning and Spectrum	)	WT Docket No. 96-148
Disaggregation by Commercial Mobile	)	
Radio Service Licensees	)	
	)	
Implementation of Section 257 of the	)	
Communications Act -	)	
Elimination of Market Entry Barriers	)	

REPLY COMMENTS OF THE NATIONAL TELEPHONE COOPERATIVE ASSOCIATION

The National Telephone Cooperative Association ("NTCA") is a national association representing approximately 500 small and rural independent local exchanges carriers ("LECs") providing telecommunications services to interexchange carriers and subscribers throughout rural America. NTCA members provide local exchange service to areas that are the most sparsely populated in the Nation. All of them meet the definition of a rural telephone company.

NTCA's reply comments are limited to the proposal to change the partitioning rules that limit partitioning in the General Wireless Services to rural telephone companies. The Commission has allocated 25 MHZ of spectrum in the 4660-4685 band for General Wireless Services. Five 5 MHZ licenses, Blocks A through E are authorized for Economic Areas ("EAs") and EA-like areas. Licensees may provide any fixed or mobile service except broadcast services,

radiolocation services, and satellite services, including Mobile Satellite Service.[1] Existing rules provide that rural telephone companies have the right to obtain partitioned licenses in General Wireless Communications Services ("GWCS") along established geopolitical boundary, such as county lines. The partitioned area must include the wireline service area of the rural telco and it must be reasonably related to the rural telco's wireline service area.[2]

The Commission is proposing in this docket to change its partitioning rules to permit partitioning to entities other than rural telcos. It proposes a flexible approach that would permit partitioning on any license area defined by the parties. Existing rules permit licensees to obtain multiple 5 MHZ blocks and are subject to a 15 MHZ spectrum cap. These would not change.

NTCA agrees with parties commenting that the Commission's proposal conflicts with the requirements of Section 309(j) of the Communications Act of 1934.[3] The Commission has utterly failed to explain why a change of policy or of its rules is appropriate. There is no evidence in the record of any changed circumstances that indicate that a rule change will accomplish the goal of ensuring that rural telephone companies have the opportunity to provide spectrum based services. The Commission has proposed no substitute rule or means of accomplishing the statutory objective that Congress charged it with in Section 309(j). Section 309(j)is, of course, still law. The Commission is not free to simply ignore the statute as it proposed to do here. It

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[1] In the Matter of Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, Second Report and Order, 11 FCC Rcd 624 (1995).

[2] 47 C.F.R.§ 26.209(d)(1).

[3] See Comments of the Rural Telecommunications Group at 2-7.

must adopt a meaningful alternative that is available and effective in ensuring opportunities for rural telephone companies if it changes the rule providing for partitioning.

Another indication of the Commission's abandonment of its statutory duty is its failure to even discuss in its Initial Regulatory Flexibility Act Analysis how rural telephone companies will be affected by the proposal in the Further Notice. As NTCA has pointed out many times in various proceedings before the Commission, rural telephone companies are "small entities" under the Regulatory Flexibility Act. The Commission must consider what adverse impacts its rule changes will have on these companies and weigh the burdens imposed by its rules.

The Commission cannot evade its obligation under the RFA by relying on an erroneous definition of "small entities" to exclude consideration of the adverse impacts its proposal may have on a whole group of companies that the SBA considers "small entities."[4]. The RFA provides:

> the term 'small business' has the same meaning as the term 'small business concern' under section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.

Section 3 of the Small Business Act in turn, among other things, states that "a small -business-

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[4] According to the Commission, incumbent LECs are not "small entities" because they are "dominant" in their field. In 1986, the Commission first concluded that the Regulatory Flexibility Act did not apply to incumbent LECs, no matter how small. At that time, it reasoned that every incumbent LEC, no matter how small was not a "small entity" under Section 3 of the Small Business Act based on its interpretation of that Act. In a Report and Order released in 1987, the Commission simply affirmed its 1986 conclusion with the cursory statement, "[n]o argument has been advanced that would cause us to modify that determination." Regulation of Small Telephone Companies, *Report and Order*, 2 FCC Rcd 3811, 3815 (1987).

concern . . . shall be deemed to be one which is independently owned and operated and which is not dominant in its field of operation. . . ." 15 U.S.C. § 632(a)(1). The SBA Administrator may use additional criteria in defining a small-business-concern but other federal agencies are prohibited from so doing without first pertaining SBA approval and providing for public notice and comment. 15 U.S.C. § 632(a)(2). SBA regulations implement Section 3 of the Small Business Act by providing that other agencies must use SBA regulations that define whether a business entity is small unless they establish a different definition that complies with SBA requirements and that receives the approval of the SBA Administrator.[5] Small incumbent LECs meeting the SBA's definition of "small entity" are among the class of carriers that will be affected by the rule change proposed in this FNPRM. It is therefore imperative that the Commission perform an RFA analysis so that it may consider any adverse impact the proposed rule change for the GWCS service will have on these companies and review alternatives which may reduce adverse impacts on the companies.

[5] 13 C.F.R. § 121.902.

CONCLUSION

For the above stated reasons, the Commission must should not alter its rules before it provides meaningful alternatives that provide rural telephone companies the benefits Congress intended in enacting Section 309(j) of the Act.

Respectfully submitted,

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February 25, 1997

CERTIFICATE OF SERVICE

I, Gail C. Malloy, certify that a copy of the foregoing Reply Comments of the National Telephone Cooperative Associaiton in WT Docket No. 96-148 was served on this 25th day of February 1997, by first-class, U.S. Mail, postage prepaid, to the following persons on the attached list:

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